

IN THE

# Supreme Court of the United States

October Term, 1990

DAN COHEN,

*Petitioner.*

vs.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star  
and Tribune Company, and NORTHWEST PUBLICA-  
TIONS, INC.,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF MINNESOTA

## BRIEF OF RESPONDENT COWLES MEDIA COMPANY IN OPPOSITION TO PETITION

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### **Questions Presented**

Should this Court grant review of decisions of the Minnesota Supreme Court based upon state law of contract and promissory estoppel, in order to consider petitioner's expansive and novel theories of the interests of confidential news sources?

Should this Court overrule a century and a half of precedent and hold that the Contract Clause of the United States Constitution applies to state judicial decisions?

Respondent Cowles Media Company respectfully submits that this Court should not grant certiorari to review the two questions presented in Cohen's Petition, as rephrased above. In the event that this Court does grant certiorari, respondent submits that the following question is also presented for review:

Does the First Amendment permit a public figure plaintiff to recover reputation-related damages arising from the publication of information about matters of public significance without proving that the publication contains a false statement of fact which was made with knowledge of its falsity or with reckless disregard for its truth or falsity?

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**BRIEF OF RESPONDENT COWLES MEDIA COMPANY  
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**STATEMENT OF THE CASE**

Petitioner Dan Cohen obtained a jury verdict on two theories: misrepresentation and breach of contract. The appellate courts overturned the misrepresentation verdict because the facts of the case simply did not support a fraud claim. Although his petition is somewhat unclear on this point, Cohen does not appear to be seeking further review on the misrepresentation issue. The disposition of the misrepresentation issue eliminates his recovery of \$500,000 in punitive damages.

The Minnesota Supreme Court disposed of the contract

claim on the sensible state law policy grounds that the law “does not create a contract where the parties intended none.” (A-9.) “In other words, contract law seems here an ill fit for a promise of news source confidentiality. To impose a contract theory on this arrangement [between a reporter and a source] puts an unwarranted legal rigidity on a special ethical relationship, precluding necessary consideration of factors underlying that ethical relationship.” (A-10.) The Minnesota Supreme Court thus, as a matter of state law, held that no contract had been created in the present circumstances. Neither ruling presents a federal question for this Court.

The only context in which the Minnesota Supreme Court mentioned a federal constitutional issue (specifically, the First Amendment) was in its discussion of a possible theory of promissory estoppel — a theory which was not presented at trial, which was not briefed, and which “surfaced” (A-11) only obliquely at the end of oral argument at the Minnesota Supreme Court. Petitioner frames the question for review in sweeping terms: “Does the First Amendment of the U.S. Constitution grant newspapers immunity from liability for damages caused by dishonoring promises of confidentiality given in exchange for information on a political candidate?” The actual decision of the Minnesota Supreme Court is more narrow:

We . . . are not inclined to decide more than we have to decide. There may be instances where a confidential source would be entitled to a remedy such as promissory estoppel, when the state’s interest in enforcing the promise to the source outweighs First Amendment considerations, but this is not such a case. (A-14.)

Cohen’s Petition does more than overstate the holdings of the Minnesota Supreme Court. It also leaves unclear exactly which of those holdings he is asking this Court to review. His second Question Presented for Review (concerning the Contract Claim) obviously applies only to the Minnesota Supreme Court’s ruling on the contract claim. However, his first Question Presented for Review (concerning the First Amendment) and his entire discussion of the First Amendment and confidential sources are an exercise in obfuscation. He blurs any distinction between the Minnesota Supreme Court’s discussions of contract and promissory estoppel and implies that both involved the First Amendment, despite the clear statement by that court that “First Amendment implications” played no role in its resolution of the contract claim (A-12-13).

**REASONS WHY THE PETITION SHOULD BE DENIED**  
**IN ITS CURRENT POSTURE, THIS CASE PRESENTS NO IMPORTANT QUESTIONS OF FEDERAL LAW TO BE SETTLED BY THIS COURT.**

The Minnesota Supreme Court reversed each of Cohen’s jury awards on issues of state law. Accordingly, this Court has no reason to grant certiorari merely to grapple with the unusual factual circumstances of this case.

**I.**

***The Minnesota Supreme Court’s Ruling on the Promissory Estoppel Issue is a Proper Balancing of Interests under State Law.***

The Minnesota Supreme Court’s discussion of a possible promissory estoppel theory does include consideration of First Amendment issues. (A-10-14.) That discussion, how-

ever, does not necessarily present First Amendment questions in a manner requiring further consideration by this Court. Petitioner at no time pursued recovery under a theory of promissory estoppel. "Estoppel" arose at oral argument before the Minnesota Supreme Court only in the context of questions from dissenting Justice Yetka, during the rebuttal presentations of counsel for the newspapers; that estoppel discussion took a substantially different form than that discussion in the majority opinion.<sup>1</sup> The court's references to "First Amendment considerations" (A-14) are broad enough implicitly to include state as well as federal constitutional guarantees, together with state common law interests in protecting public debate on political campaigns.

The Minnesota Supreme Court noted that in deciding whether to enforce a promise under a promissory estoppel analysis, it "must balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity." (A-13.) The court concluded that free press rights were particularly important in the present circumstances:

Of critical significance in this case, we think, is the fact that the promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign. The potentiality for civil damages for promises made in this context chills public debate, a debate which Cohen willingly entered albeit hoping to do so on his own terms. (A-13.)

<sup>1</sup>Upon request by the Court, counsel will provide a tape recording of the oral argument and an unofficial transcript of the argument.

Cohen mischaracterizes the Minnesota Supreme Court's carefully limited decision as "empower[ing] newspapers to inflict injuries with impunity by deliberately breaking promises of confidentiality given for the purpose of obtaining desired information." Cohen Petition at 6.

In seeking a federal question to present to this Court, Cohen understandably focuses upon the free press rights involved in the promissory estoppel "balance." Cohen's focus ignores the other half of that balance, namely, "the common law interest in protecting a promise of anonymity." (A-13.) Just how strong is that interest? If it is relatively weak under state law, then there is no reason for this Court to decide whether the Minnesota Supreme Court accorded too much weight to the First Amendment interests here.<sup>2</sup> Cohen's interests here in fact are substantially less significant than the national security interests in protecting classified information which were the subject of the written employment agreement in *Snepp v. United States*, 444 U.S. 507 (1980), or the privacy interests of the prison inmate who protested being filmed in an "exercise cage" in *Huskey v. National Broadcasting Co., Inc.*, 632 F.Supp. 1282 (N.D.

<sup>2</sup>The Minnesota Supreme Court did not expressly address either how much weight would be necessary to outweigh First Amendment interests or how much weight should be given to Cohen's interests in these particular circumstances. The publications at issue here involved truthful information about a matter of public significance. "If a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *The Florida Star v. B.J.F.*, 491 U.S. \_\_\_, \_\_\_, 105 L.Ed. 2d 443, 455 (1989); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979). Cohen's desire to engage in negative campaigning under a cloak of anonymity is not a "highest order" interest. Indeed, Cohen's interest is sufficiently weak in the present circumstances so that any free press interest at all should be sufficient to overcome it. Cohen wants a rule that would prevent courts and juries from any consideration whatsoever of the interests of the press and the public in communicating truthful information about matters of public significance. This Court should reject such a rule now, as it consistently has done in the past.

Ill. 1986). Nor does this case involve the government's interest in setting conditions on the use of information which the government itself has extracted from an unwilling source, as in *Seattle Times Company v. Rhinehart*, 467 U.S. 20 (1984).

Cohen stresses the general importance of confidential sources in the newsgathering process, Cohen Petition at 6-10, but totally ignores the fact that confidential sources enjoy common law or statutory protection only in the context of privileges protecting *reporters* from compulsory testimony in some circumstances:

However the [journalist's] privilege is applied, it appears to protect the communicator, not the source. Only the reporter may waive the privilege. Minnesota's *Cohen* case [prior to the decision of the Minnesota Supreme Court] alone suggests otherwise. Generally, a broken promise by a reporter raises an ethical question but provides no legal cause of action.

D. Gillmor & J. Barron, *Mass Communication Law: Cases and Comment* 394 (5th Ed. 1990).

Sources cannot "waive" the privilege and compel reporters to testify. *United States v. Cuthbertson*, 630 F.2d 139, 147 (3rd Cir. 1980) ("The privilege belongs to CBS, not the potential witnesses, and it may be waived only by its holder."), *cert. denied*, 449 U.S. 1126 (1981); *Palandjian v. Pahlavi*, 103 F.R.D. 410, 413 (D.D.C. 1984) ("Initially, and this Court believes dispository, the privilege belongs to the movant journalist and not to the defendant. . . . Therefore, even if the notes and tapes in question are of defendant's own words, she is not entitled to 'waive' the privilege for the movant."); *Los Angeles Memorial Coliseum Com-*

*mission v. National Football League*, 89 F.R.D. 489, 494 (C.D. Cal. 1981) ("The journalist's privilege belongs to the journalist alone and cannot be waived by persons other than the journalist."); *State v. Boiardo*, 416 A.2d 793, 798 (N.J. 1980) ("the privilege is that of the newsperson and not the source").

Courts have refused to allow a source to invoke the privilege to shield information that a newsperson may wish to disclose, *Small v. UPI*, 1989 U.S. Dist. Lexis 12459 at \*3 (S.D.N.Y. 1989) (Roberts, Mag.) ("Plaintiff correctly argues that under both the New York Shield Law and the First Amendment, the privilege attaches to the journalist, not to the source of his information. . . . Thus [the sources and their employer] are not entitled to assert the privilege."), or to protect themselves (as possible sources) from depositions noticed by a third-party seeking to determine the identities of confidential sources, *Stuart W. Jamieson v. John Doe and Mary Roe*, Nos. CX-89-406 and CI-89-407 (Minn. Ct. App. March 21, 1989).<sup>3</sup>

The Minnesota Supreme Court itself observed:

Here Cohen lost his job; but whether this is an injustice which should be remedied requires the court to examine a transaction fraught with moral ambiguity. Both sides proclaim their own purity of intentions while condemning the other side for "dirty tricks." Anonymity gives the source deniability, but deniability, depend-

<sup>3</sup>The decisions in *Stuart W. Jamieson v. John Doe and Mary Roe*, Hennepin County District Court File No. MC 88-18860, on petition for writs of prohibition and discretionary review, Minnesota Court of Appeals Nos. CX-89-406 and CI-89-407 are unpublished, but were called to the attention of the Minnesota Supreme Court in Cowles Media Company's Brief below at 40 n.11 and were reproduced in the Appendix to the Minnesota Supreme Court. The plaintiff in that case allegedly had been defamed by an anonymous source in a newspaper article and sought "to depose likely perpetrators of the falsehood." Hennepin County Dis-

ing on the circumstances, may or may not deserve legal protection. If the court applies promissory estoppel, its inquiry is not limited to whether a promise was given and broken, but rather the inquiry is into all the reasons why it was broken. (A-11.)

The promissory estoppel ruling below therefore can be seen as resting upon the adequate and independent state law ground that, in the circumstances of the present case, Cohen willingly entered into the public debate and has no legally protectable interest in anonymity.

## II.

### ***The Minnesota Supreme Court's Ruling on the Breach of Contract Claim Presents No Federal Question.***

#### ***A. State Law Alone Determines When an Agreement Becomes a Binding Contract.***

The Minnesota Supreme Court, held as a matter of valid and sufficient state law, that the circumstances of agreements between reporters and sources do not create recognizable

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trict Court Order and Memorandum dated February 1, 1989, at 7 (MN-APP 568). The protected deponents "could themselves be, or could know who are, the 'sources' in the erroneous newspaper article" (MN-APP 569). The District Court rejected the deponents' efforts to assert the shield law privileges on their own behalf:

The statutory privilege is that of the media, not of the sources. To permit sources to hide behind the media's statutory privilege would encourage defaming and slandering informants to gain sanctuary for their misdeeds by the device of broadcasting falsehoods to the media. The issue of media statutory privilege is not before the Court, since Deponents are not protected by the statute and have no standing to assert the media's privilege. (Id. at 9; MN-APP 570).

The Minnesota Court of Appeals denied the potential deponents' petitions for writs of mandamus and for discretionary review, noting that "Petitioners failed to establish they are likely to suffer significant injury as a result of the trial court's order, or to establish a compelling reason for this court to extend discretionary review to a discovery determination." Minnesota Court of Appeals Order dated March 21, 1989, ¶10 (MN-APP 573).

contracts. Indeed, it is widely accepted that not every agreement, not every conversation, not every exchange of promises between two persons becomes a legally binding contract. "[I]f, from the statements or conduct of the parties or the surrounding circumstances, it appears that the parties do not intend to be bound or do not intend legal consequences, then under the great majority of the cases there will be no contract." J. Calamari & J. Perillo, *Contracts* § 2-4 at 28, 30 (3d ed. 1987). As the Minnesota Supreme Court held below, the law does not create a contract where the parties intended none, nor does the law consider binding every exchange of promises. (A-9.) Neither Cohen nor the reporters anticipated resorting to the courts to enforce their arrangement. It is purely a matter of state law where to place any particular agreement on the continuum between non-binding social promises and legally binding formal contracts. The Minnesota Supreme Court concluded that agreements between reporters and sources in the special milieu of media newsgathering do not form legal contracts. "What we have here, it seems to us, is an 'I'll scratch-your-back-if-you'll-scratch-mine' accommodation. . . . We conclude that a contract cause of action is inappropriate for these particular circumstances." (A-9, 10.) That conclusion rests directly and obviously upon a construction of state contract law.

#### ***B. The Contract Clause Does not Apply to Judicial Decisions.***

Cohen disingenuously suggests that the holding below presents a federal question because the court's decision not to enforce his agreement with the newspapers allegedly violates the Contract Clause of the United States Constitu-

tution. Cohen Petition at 16-18. "The short answer to this contention is that this provision [the Contract Clause], as its terms indicate, is directed against legislative action only." *Barrows v. Jackson*, 346 U.S. 249, 260 (1953). A "long line of decisions" establishes that the Contract Clause does not apply to judgments of courts. *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 & n.1 (1924) (footnote lists decisions back to 1847 on same point); L. Tribe, *American Constitutional Law* 613 n.1 (2d ed. 1988). Cohen brushes aside these cases by characterizing them as "[s]ome decisions antedating *Allied Structural Steel*." Petition at 18. While it is true that *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), is a later case, nothing in *Allied Structural Steel* suggests a contrary result; that case itself involved *legislation* which allegedly violated the Contract Clause. Cohen presents no compelling circumstances here to overrule nearly a century and a half of this Court's decisions.

### III.

***This Court Should Reject Petitioner's Attempt to Evade the Constitutional and Common Law Protections for Truthful Newspaper Reports of Matters of Public Interest in Political Campaigns.***

Cohen's claims present, at base, yet another attempt to evade the protections of common law and of state and federal constitutions for truthful newspaper reports of matters of public interest. Cohen complains that he was damaged by publication of accurate accounts of his role in publicizing disparaging information about a candidate for statewide public office. From opening statement to closing argument, Cohen's trial tactics underscored that the gravamen of this case was the publication of information. Cohen's injuries

were characterized repeatedly in terms associated with reputational injury: "ridicule," "grief and embarrassment," "humiliation" and efforts "to assassinate the character." His counsel asked the jury to "restore . . . [Cohen's] good name." As Judge Crippen observed in his dissent in the Minnesota Court of Appeals, "the breach of contract claim was thin cover for a much more intrusive indictment on editorial choices." (A-48). Cohen had to try to disguise his claim under theories of fraud and breach of contract, because he had no defamation claim: The objectionable information was not published with actual malice in the constitutional sense, and it was indisputably true.

Such attempts to evade the strictures of defamation law usually have been recognized and rebuffed before they reach this Court. On occasion, however, this Court has had to reverse an award of damages based upon such end-runs around defamation law which somehow had survived their passage through the lower courts. *E.g., Hustler Magazine, Inc. v Falwell*, 485 U.S. 46 (1988) (tort of intentional infliction of emotional distress). The present claim for breach of contract represents nothing more nor less than another effort to recover defamation-type damages while avoiding defamation defenses.

This is the first case in which a breach of contract claim arising from media newsgathering activities resulted in a jury verdict for a plaintiff and even partially survived initial

appellate review.<sup>4</sup> Cohen's legal theory has an audacious scope. As presented by Cohen in the trial court and on appeal, the breach of contract claim left no room for consideration of free press interests or of the public's interest in obtaining full and accurate information about an upcoming election; once an agreement (however flimsy) was made and broken, the only question under Cohen's theory would be the extent of recoverable damages. Cohen's argument, that any information provided by a news source was sufficient to make a legally binding contract out of any promise made by a reporter, could produce enormous court intrusion into newsgathering activities. *See, e.g., Strick v. Supreme Court*, 143 Cal. App. 3d 916, 925 n.5, 192 Cal. Rptr. 314, 320 n.5 (Cal. Ct. App. 1983) (noting but not addressing plaintiffs' claim of breach of oral contract to "portray [plaintiffs] in a favorable light to the readers" if

plaintiffs would talk to magazine reporters). Cohen's Petition makes much of the present factual setting of a confidential source, but his counsel has acknowledged elsewhere that "[p]otential claims for breach of contract, or fraud, [are] not limited to violations of promises of confidentiality." Rothenberg, *Contract Law and the Media*, *Libel Litigation* 1990 at 23, 26 (PLI 1990). When state law permits claims against news organizations to proceed in the guise of fraud or breach of contract, courts may have to place first Amendment limitations on such claims. *See Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289 (D. Minn. 1990), *appeal pending*.<sup>5</sup> Here, however, the Minnesota Supreme Court dismissed Cohen's claims because they did not meet the requirements of state law. Accordingly, this Court does not need to consider the constitutional issues which may arise in other cases.

<sup>4</sup>Courts before and after the first *Cohen* decision gave short shrift to contract claims arising from publication of allegedly confidential information. *See, e.g., Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 81, 155 Cal. Rptr. 29, 41 (Cal. Ct. App.), *Cert. denied*, 444 U.S. 984 (1979); *Stevenson v. Nottingham*, 4 Med. L. Rptr. 1585 (Fla. Cir. Ct. 1978); *Virelli v. Goodson-Todman Enterprises, Ltd.*, 142 A.D. 2d 479, 536 N.Y.S. 2d 571, 576, 15 Med. L. Rptr. 2447, 2450 (N.Y. App. Div. 1989), *appeal after remand*, 558 N.Y.S. 2d 314, 315, 18 Med. L. Rep. 1111, 1112 (N.Y. App. Div. 1990). Two courts in California allowed breach-of-contract claims against the media to proceed to trial, but the juries could not agree on a verdict. Borger, *Publication Torts as Contracts and Misrepresentation: Redirecting Judicial Focus*, *Libel Litigation* 1990 at 35, 78 (Case 9) and 88 (Case 18) (PLI 1990). Cohen cites this article, by Cowles Media's counsel of record, as "list[ing] thirty cases around the country raising issues of violations of contracts or promises by media organizations." Cohen Petition at 10. The article in fact notes that "[f]ew reported decisions have discussed contract or fraud issues at length in connection with newsgathering or First Amendment defenses." Borger at 69; the cases collected cover a 23-year period and often touched upon contract and fraud issues briefly, tangentially and in dicta. The only newsgathering breach-of-contract case mentioned in that survey which is still active is *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289 (D. Minn. 1990) (summary judgment granted in favor of defendant), *appeal pending*, in which the plaintiff is represented by Elliot Rothenberg, Cohen's counsel of record here.

<sup>5</sup>In its briefs below, Cowles Media advocated a rule, along the lines of *Hustler Magazine v. Falwell*, that plaintiffs like Cohen who suffer reputational damages due to the publication of information about matters of public significance may not recover without showing that the publication contains a false statement of fact which was made with the level of fault required for the particular class of plaintiff involved. The Minnesota Supreme Court did not have to reach this issue, although it did hold that "Cohen would qualify as a public figure." (A-5 n.3.)

**CONCLUSION**

In its present procedural posture, this case does not present federal questions of sufficient importance to require this Court's review. Petitioner Cohen initially was able to avoid the requirements of an action for defamation by convincing a jury to award damages, based upon the publication of truthful information about campaign tactics, on the two legal theories of fraud and breach of contract. The appellate courts below reversed each jury award for reasons of state law. No reason remains for this Court to grant certiorari. Therefore, this Court should deny Cohen's petition.

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